Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

DONALD G. STELZNER and DONNA M. STELZNER,
Petitioners,

v.

COMMISSIONER OF REVENUE,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Minnesota

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Commerce Clause permits a state to tax, without apportionment, 100% of an individual's income earned in interstate commerce, by asserting its tax authority to reach a "nondomiciliary resident," when that individual is a resident of, and domiciled in, another state that chooses not to impose an individual income tax.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were petitioners Donald and Donna Stelzner and respondent Commissioner of Revenue of the State of Minnesota.

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PETITION FOR A WRIT OF CERTIORARI

Donald G. and Donna M. Stelzner petition this Court for a writ of certiorari to review the judgment of the Supreme Court of Minnesota.

OPINIONS BELOW

The opinion of the *en banc* Minnesota Supreme Court (Pet. App. 1a-13a) is reported at 621 N.W.2d 736 (Minn. 2001). The Minnesota Tax Court's decision (Pet. App. 14a-28a) is reported at No. 7005, 2000 Minn. Tax LEXIS 3 (Jan. 12, 2000).

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on March 21, 2001. (Pet. App. 29a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides in pertinent part:

> The Congress shall have Power . . . To regulate commerce . . . among the several States.

U.S. Const. art. I, § 8, cl. 3.

The following Minnesota statutes are also involved in this case:

> Subd. 7. *Resident.* The term "resident" means . . . (2) any individual domiciled outside the state who maintains a place of abode in the state and spends in the aggregate more than one-half of the tax year in Minnesota . . . .

Minn. Stat. § 290.01, subd. 7(2) (2000).

> *Jurisdiction To Tax in General.*
>
> Subdivision 1. *Resident individuals.* All net income of a resident individual is subject to tax under this chapter.

Minn. Stat. § 290.014, subd. 1 (2000).

Gross Income, Allocation To State.

Subdivision 1. *Scope of allocation rules.* (a) The income of resident individuals is not subject to allocation outside this state.

Minn. Stat. § 290.17, subd. 1 (2000).

STATEMENT OF FACTS

Between 1987 and 1993, petitioners Donald G. and Donna M. Stelzner were domiciled in Nevada and earned their income from a business that had a substantial nexus to Nevada and affected both interstate and foreign commerce. The Stelzners maintained a residence in Nevada; regularly conducted business in Nevada; were registered to vote in Nevada and voted there; had Nevada driver's licenses; and subjected themselves to applicable Nevada taxes, including sales and property taxes. Because Nevada has no state income tax, the Stelzners did not pay income tax to Nevada.

For the convenience of their business, the Stelzners also maintained a residence in Minnesota, where they spent a portion of each tax year between 1987 and 1993. Notwithstanding the Stelzners' substantial nexus to Nevada, and Nevada's decision to exempt its residents from personal income tax, Minnesota tax authorities sought to tax 100% of the Stelzners' income for the years 1987-1993. In proceedings below, the Stelzners argued that this broad-ranging attempted taxation was incompatible with the Dormant Commerce Clause, but the Minnesota Supreme Court rejected their argument. In a decision that encroaches on Nevada's taxation policy and creates substantial uncertainty regarding the tax liability of persons engaged in interstate business activities, the Minnesota Supreme Court upheld Minnesota's right to tax *all* of the Stelzners' income, without any apportionment to account for their substantial out-of-state income-generating activity or their ties to Nevada.

A. The Stelzners' Interstate Business Activities And Ties to Nevada

The Stelzners were married in Nevada in 1958 and established their domicile and residence there in 1969. After working in various positions in the casino industry, they formed their own business in Nevada in 1975 to service the foreign currency exchange needs of the casino industry. Casinos exchange a significant amount of foreign currency, particularly Canadian dollars, from their foreign customers. The Stelzners believed that their business could better serve the casinos than did the foreign exchange services of local banks. After starting their business in Nevada, the Stelzners expanded it to service casinos in New Jersey, Illinois, some Native American tribal lands, and the Canadian Province of Ontario. The business was operated under the names Bond Mortgage Forex and Bond Mortgage New Jersey, both of which were Nevada general partnerships with the Stelzners as the only partners.

The Stelzners were personally involved in all aspects of their business. When casinos accumulated inventories of foreign currencies, Donald Stelzner traveled to the casinos and purchased the inventory, offering higher rates than competitors. The Stelzners offered their customers convenient service hours, on-site verification of currency in the presence of casino personnel, and immediate U.S. cash or cash equivalent settlement of transactions—services not offered by their competitors. (Stip. 150).[1] Mr. Stelzner transported the purchased foreign currency, initially to an off-site location for safekeeping, and then to an exchange location. For the Canadian currency, this meant traveling to Canada to take advantage of the more favorable exchange rates for Canadian currency available in Canadian banks. To

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[1] "Stip." refers to the stipulated facts that the parties filed in the Ramsey County, Minnesota Tax Court.

exchange other currencies, Mr. Stelzner would travel to large banks in New York or California that operated foreign currency exchanges. In connection with these business activities, he traveled interstate, and to Canada, by air, ship, train, bus, and automobile.

The Stelzners' business grew throughout the late 1970s and 1980s, eventually capturing as much as 85% of the foreign currency exchange business generated by the Nevada and New Jersey casino industry, and exchanging up to $20 million per year in foreign currencies. The Stelzners' personal income was generated primarily from this business.

Donald Stelzner acted as a courier for his business, personally transporting large amounts of U.S. and foreign currency. For security reasons, he decided not to live exclusively in Nevada, but to maintain another residence that was convenient for his interstate and Canadian travel. The Stelzners selected Minneapolis, Minnesota because of its position as an airline hub servicing Canada and other U.S. cities and because a Federal Reserve Bank was located there. The Stelzners were born and raised in Minnesota and had previously engaged in buying, improving, and selling residential property in both Minnesota and Nevada. In 1983, while still maintaining their Nevada residence and domicile, they purchased a residence in Minneapolis.

The Stelzners engaged in no currency transactions in Minnesota, had no sales there and paid no wages there. Rather, their business took place at their customers' locations, primarily in Nevada and New Jersey, where they purchased the foreign currency, and at the financial exchange centers in other parts of the United States and Canada, where they sold the foreign currency. The Minnesota residence was convenient for travel to and from Canada, and for awaiting the next business trip to customers in the United States and Canada.

During the Minnesota tax years in question (1987-1993), the Stelzners continued to be domiciled in Nevada, where they maintained their voter registrations and driver's licenses, while maintaining their residence in Las Vegas. They filed partnership returns for their business and their individual federal tax returns listing Nevada as their residence. Because of the travel associated with their business, the Stelzners each spent more than 300 days per year away from their Nevada home at their Minnesota residence. Nevertheless, when the Internal Revenue Service audited their 1984 federal tax return, it determined that the Stelzners were domiciliaries of Nevada and permitted them to deduct office and other "away from home" expenses (similar to hotel expenses) for the Minnesota residence. These expenses included a per diem food allowance for all time spent in transit and when in currency exchange operational areas outside of Las Vegas, including all time spent in Minnesota. (Stip. 190).

B. Minnesota's Attempt to Tax 100% of the Seltzners' Income

Minnesota's taxation scheme provides that 100% of the "net income of a resident individual" is subject to taxation by the State of Minnesota. Minn. Stat. § 290.014, subd. 1. In 1987, Minnesota amended the definition of "resident" to include "any individual domiciled outside the state who maintains a place of abode in the state and spends in the aggregate more than one-half of the tax year in Minnesota." Act of May 28, 1987, ch. 268 art. 1, § 10, 1987 Minn. Laws 1044-45 (codified at Minn. Stat. § 290.01, subd. 7(2) (2000)). Thus, by enacting the 1987 statute, Minnesota asserted the right to tax 100% of the income earned by persons who are domiciled outside the state, provided they fall within the statute's ambit.

The Minnesota tax commissioner conducted an audit of the Stelzners for tax years 1987-1993 and on July 20, 1995,

issued an order finding the Stelzners liable for Minnesota income taxes, penalties and interest for each of those years, in the total amount of $402,673.87. When their administrative appeal was denied, the Stelzners appealed to the Minnesota Tax Court where they asserted that they were Nevada domiciliaries and challenged the application of the Minnesota nondomiciliary resident statute to them. In the Tax Court, the Stelzners argued that Minnesota's taxation of their entire income, without any apportionment, violated the Commerce, Equal Protection, and Due Process Clauses of the United States Constitution. (Pet. App. 19a). In the alternative, the Stelzners raised claims based on estoppel and abatement. The Tax Court ruled against the Stelzners on all claims, finding no need to reach the issue of domicile, by holding that they were nondomiciliary residents under Minn. Stat. § 290.01, subd. 7(2) and that application of this statute to tax the Stelzners' entire income did not implicate the Commerce Clause. The Tax Court also rejected the Stelzners' other constitutional challenges. (Pet. App. 20a-26a).

The Stelzners appealed on a writ of certiorari to the Minnesota Supreme Court. In that court, the Stelzners again argued that, as nondomiciliary residents, Minnesota's tax on their entire income generated from transactions occurring in interstate commerce, and primarily outside the state, without apportionment, violated the Commerce Clause. (Pet. App. 5a). The Stelzners also raised their abatement claim.

In a published opinion, the Minnesota Supreme Court rejected the Stelzners' Commerce Clause claim. While noting that the Dormant Commerce Clause bars state action that "discriminates against or places an undue burden on interstate commerce," (Pet. App. 7a), the court found no such state action here. Rather, the court reasoned that Minnesota's taxation scheme imposed only an "incidental impact on [the Stelzners'] cost of doing business in interstate commerce,"

and thus did not discriminate against, or impose an undue burden on, interstate commerce. (Pet. App. 10a).[2]

In its opinion, the Minnesota Supreme Court brushed aside the risk of multiple taxation that is created by Minnesota's tax scheme. The court stated in a footnote that the Minnesota tax code, Minn. Stat. § 290.06, subd. 22 (2000), allows a credit against Minnesota taxes for income taxes paid by a nondomiciliary resident to the resident's domicile jurisdiction. The court asserted that this provision generally "protects nondomiciliary residents from multiple taxation." (Pet. App. 7a n.1). In this case, however, the credit provision did not apply, since the Stelzners paid no taxes to Nevada, which does not tax individual income. Thus, the Minnesota court asserted that "there is no issue of multiple taxation in this case." (Pet. App. 7a n.1). The Minnesota court did not even acknowledge Nevada's policy of sparing its domiciliaries from state income tax liability, an important policy decision that Minnesota's tax scheme completely overrides.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

This case presents a latent conflict between two important lines of this Court's precedents. The first line of decisions holds that, under the Dormant Commerce Clause, a state may only tax a fair proportion of a taxpayer's unitary income from business activities in interstate commerce. In addition to their specific holdings, these decisions reflect the Court's general approach to the Dormant Commerce Clause as prohibiting the kind of economic self-aggrandizement by states that, if widely copied, would result in a balkanization of the national economy.

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[2] The Minnesota Supreme Court also rejected the Stelzners' abatement claim (Pet. App. 10a-13a), which the Stelzners do not seek to raise before this Court.

The second and competing line of this Court's cases holds that a state may tax 100% of the worldwide income of a resident of the state without violating the Due Process Clause. These cases reflect the general tax principle that domicile alone creates a sufficient basis for a jurisdiction to reach 100% of a person's income.

As illustrated by the decision below, these two lines of cases collide when an individual conducts a business affecting interstate commerce and is a domiciliary or resident of more than one state—as each state separately defines those terms. Such circumstances give rise to the obvious problem of conflicting tax obligations, as well as the potential of states to defeat an individual's choice of tax jurisdiction by expanding their definition of residency. Nonetheless, state courts confronting constitutional challenges to their personal income taxation schemes can be expected to invoke the second line of cases (supporting their parochial exercise of the taxing power) at the expense of the first (which limits such power in the national interest). The second line of cases, very simply, allows states to maximize the amount of taxes that they collect, without regard for harm on interstate commerce or conflict with the tax policies of other jurisdictions. Yet, as this Court's jurisprudence on the Dormant Commerce Clause makes clear, our federal system necessarily requires limitations on the scope of state taxation schemes that affect interstate commerce.

This case provides an ideal vehicle for the Court to resolve the significant tension between its approach to the taxation of business income derived from interstate commerce and its approach to a state's taxation of its residents under the Due Process Clause. More specifically, this case presents the Court with the opportunity to direct states that their parochial interest in taxing 100% of their residents' income is limited by the Dormant Commerce Clause and that such a limitation is clearly triggered where, as here, the taxpayer in question is

deemed a resident of more than one state and earns income in a business affecting interstate and foreign commerce.

The issue presented by this case is important. In today's complex economy, individuals often earn income in multiple states and, under commonplace rules for defining residency, may be considered legal "residents" of more than one state. Prominent examples of the phenomena abound. Issues of fair apportionment and potential multiple taxation arise, for example, in the context of professional athletes who travel around the country as part of their occupation. *See* Jeffrey L. Krasney, *State Income Taxation of Nonresident Professional Athletes*, 47 Tax Law. 395 (1994). More generally, the transportation revolution is increasingly making business commuters of us all.

It is thus hardly surprising that the Minnesota Supreme Court is not the first state supreme court to confront these questions, and to resolve them in favor of the state's taxation power. In *Tamagni v. Tax Appeals Tribunal*, 695 N.E.2d 1125, 91 N.Y.2d 530, 673 N.Y.S.2d 44 (N.Y. 1998), *cert. denied*, 525 U.S. 931 (1998), New York's highest court considered virtually the same issue that is presented in the instant case and held, over a vigorous dissent, that the Dormant Commerce Clause did not preclude New York from taxing 100% of the income of an individual who was domiciled in New Jersey, and who also faced tax liability there.[3]

This parochial approach is deeply offensive to the principles underlying the Constitution. As this Court has observed—not only in the context of the Commerce Clause

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[3] The issues presented in this case have also received scholarly attention. *See* Seth Goldstein, Note, *"Resident" Taxpayers: Internal Consistency, Due Process, and State Income Taxation*, 91 Colum. L. Rev. 119 (1991) (concluding that some state definitions of "resident" are overly broad and result in unconstitutional taxation).

but also in discussing the Privileges and Immunities Clause and even the right to travel—the free flow of commerce and the free transfer of individual allegiance among fifty competing jurisdictions is a vital feature of our system of federalism. *See, e.g., Zobel v. Williams*, 457 U.S. 55, 67-68 (1982) (Brennan, J., concurring) ("A State clearly may undertake to enhance the advantages of industry, economy, and resources that make it a desirable place in which to live . . . .That is a healthy form of rivalry.").

As the facts of this case amply demonstrate, a state's assertion of power to tax 100% of the income of a nondomiciliary defeats this constitutionally mandated "healthy form of rivalry." The State of Nevada (like numerous other states) has chosen to engage in the rivalry for valuable citizens by declining to impose any personal income tax. Minnesota's 100% tax of a nondomiciliary resident's income utterly defeats Nevada's policy choice to attract citizens and business through its tax law. And therefore, functionally, Minnesota's tax law is indistinguishable from the many state statutes this Court has invalidated by which individual states sought to husband economic resources for themselves at the expense of sister states.[4]

Only this Court has the standing and authority to police the Dormant Commerce Clause limitation on the power of individual states to tax their residents' income. First, ultimately, only this Court can reconcile the tension in its taxation decisions. As important, no other court has an incentive to undertake such a reconciliation. State courts have a strong self-interest in upholding personal income taxation schemes under this Court's personal income tax

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[4] In addition, as a result of the conflict between this Court's Dormant Commerce Clause and certain of its Due Process Clause cases, individuals such as the Stelzners, whose business requires them to travel among multiple states, face substantial uncertainty in attempting to anticipate, and plan for, their tax liability.

precedents. And as experience in Minnesota and New York has shown, individual state courts are unlikely to give appropriate weight to the federal interests and the interests of unrepresented sister states protected by the Dormant Commerce Clause. Accordingly, this Court has no reason to await a split in authority on the issue presented in this case (for none is likely to arise); nor should it await further decisions of state courts--who will surely follow the path of Minnesota and New York.

In short, this case presents an important and appropriate opportunity for this Court to resolve a conflict among competing state taxation schemes and two lines of this Court's precedents, as well as to clarify the apportionment requirements for individuals who earn income from interstate commerce and face tax liability in multiple states.

A. The Dormant Commerce Clause And Its Apportionment Requirement

The Commerce Clause provides that Congress shall have the power to "regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3. Despite this express grant of power, this Court has consistently held this language to contain a further, negative command, known as the Dormant Commerce Clause, prohibiting certain state regulatory schemes even when Congress has failed to legislate on the subject. *See, e.g., Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995); *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992). With respect to issues of taxation, in recognition of the primacy of a national approach to commerce and to prevent economic balkanization among the states, the Dormant Commerce Clause forbids states from enacting taxation schemes that discriminate against or unduly burden interstate commerce. *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997); *Quill Corp.*, 504 U.S. at 312. In the watershed case of *Complete Auto Transit, Inc. v. Brady*,

this Court established a four-part test for determining the validity of state taxes under the Commerce Clause:

1. The tax must be applied to an activity that has a substantial nexus with the state;
2. The tax must be fairly apportioned to the taxpayer's activity;
3. The tax must not discriminate against interstate commerce; and
4. The tax must be fairly related to benefits provided by the state.

430 U.S. 274, 279 (1997); *see also Jefferson Lines*, 514 U.S. at 183; *Quill Corp.*, 504 U.S. at 311; *Goldberg v. Sweet*, 488 U.S. 252, 257 (1989); *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983).

Numerous precedents of this Court have explained that, in order to satisfy the second *Complete Auto Transit* factor—the apportionment requirement—a state taxation scheme must be both "internally and externally consistent." *Goldberg*, 488 U.S. at 261; *see also Jefferson Lines*, 514 U.S. at 185; *Container Corp.*, 463 U.S. at 169. To satisfy the requirement of internal consistency, "a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Goldberg*, 488 U.S. at 261; *see also Jefferson Lines*, 514 U.S. at 185; *Container Corp.*, 463 U.S. at 169. The second, "more difficult" requirement of external consistency, *Container Corp.*, 463 U.S. at 169, asks "whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg*, 488 U.S. at 262; *see also Jefferson Lines*, 514 U.S. at 185. In order to prevail on the contention that an apportionment formula fails the external consistency test, a taxpayer must show "that the income attributed to the State is in fact out of all appropriate proportions to the business transacted . . . in that State . . . or has led to a grossly distorted result." *Trinova Corp. v.*

Michigan Treas. Dep't, 498 U.S. 358, 380 (1991) (internal quotations omitted) (internal citations omitted); *Container Corp.*, 463 U.S. at 170 (same).

B. Cases Permitting States To Tax All Of The Worldwide Income Of "Residents"

Another line of decisions of this Court under the Due Process Clause holds that a state may tax the worldwide income of individual "residents." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 463-464 (1995); *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313 (1937); *Lawrence v. State Tax Comm'n*, 286 U.S. 276 (1932); *Shaffer v. Carter*, 252 U.S. 37 (1920). Most recently, in *Chickasaw Nation*, this Court recognized the "well-established principle of interstate and international taxation-namely, that a jurisdiction . . . may tax *all* the income of its residents, even income earned outside the taxing jurisdiction." 15 U.S. at 462-63 (emphasis in original).

In each of the foregoing cases, however, the taxpayer apparently was both a resident and a domiciliary of the taxing state. Thus, none of these cases presented a challenge to the state's taxation authority under the Dormant Commerce Clause. *See Chickasaw Nation*, 515 U.S. at 462-463 (affirming Oklahoma's right to tax income of Oklahoma resident employed by an Indian tribe; taxpayer was apparently domiciled in Oklahoma); *Cohn*, 300 U.S. at 313 (upholding New York's authority to tax income of a New York resident on income received for rent from land located in New Jersey and interest on bonds secured by New Jersey property; taxpayer was domiciled in New York); *Lawrence*, 286 U.S. at 281 (affirming Mississippi's right to tax the income of a Mississippi resident on income that he earned in Tennessee; taxpayer was a citizen of Mississippi).

C. Minnesota's Taxation Scheme

Minnesota's taxation scheme exercises the full measure of state taxation authority that was recognized in cases such as

Chickasaw Nation, Cohn, and Lawrence. Under Minnesota law, 100% of the "net income of a resident individual" is subject to taxation by the State of Minnesota. Minn. Stat. § 290.014, subd. 1. Since 1987, Minnesota has defined "resident" to include "any individual domiciled outside the state who maintains a place of abode in the state and spends in the aggregate more than one-half of the tax year in Minnesota." Act of May 28, 1987, ch. 268 art. 1, § 10, 1987 Minn. Laws 1044-45 (codified at Minn. Stat. § 290.01, subd. 7(2) (2000)). Thus, so long as an individual meets the definition of "resident," and without regard to his potential tax liability in other jurisdictions, Minnesota asserts the right to tax 100% of his worldwide income.

To be sure, Minnesota's taxation scheme incorporates a credit provision which may, in some instances, reduce or eliminate the risk of multiple taxation for persons who are considered "residents" of more than one state, and who are thereby subjected to tax liability in multiple states. Minn. Stat. § 290.06 subd. 22 (2000). Under this provision, Minnesota grants a credit, under certain circumstances, for income taxes paid to another state. However, Minnesota's credit provision utterly fails to provide any apportionment of income when the domicile state—such as Nevada in the instant case—has chosen to impose no individual income tax. In such a case, Minnesota simply overrides the domicile state's tax policy, and arrogates to itself the prerogative to tax income which has no fair nexus to Minnesota and which would otherwise be exempt from taxation based on the policy choice of the domicile jurisdiction. This feature of the Minnesota tax scheme, which is squarely presented by the facts of this case, presents serious Dormant Commerce Clause issues which should be resolved by this Court.[5]

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[5] In addition, the Minnesota income tax credit provision fails the internal consistency test of *Complete Auto Transit.* Under this test, the provision must be such that if it were applied in every jurisdiction, no

II. THE DECISION BELOW REVEALS A NEED FOR CLARIFICATION REGARDING THE CONSTITUTIONAL LIMITATIONS ON A STATE'S POWER TO TAX THE INCOME OF A NONDOMICILIARY RESIDENT

A. The Dormant Commerce Clause Imposes Constitutional Limits On A State's Power To Tax The Income Of A Nondomiciliary "Resident"

As this Court's precedents make crystal clear, the Dormant Commerce Clause constrains the states' authority to administer their own individual taxation schemes. Indeed, the very *purpose* of Commerce Clause scrutiny is to "attempt 'to ensure that each State taxes only its fair share of an interstate transaction.'" *Trinova Corp.*, 498 U.S. at 386 (quoting

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multiple taxation would result. Such a result is not assured here. The Minnesota credit is granted only if the other state does *not* grant a similar credit. Minn. Stat. § 290.06 subd. 22 (2000). If this formula were applied in every jurisdiction, multiple taxation could result because each state could argue with equal force that the other state apply the credit. This could result in the taxpayer getting no credit from any state. Thus multiple taxation would occur. Alternately, it would be impossible to determine whether to apply the credit, as each state's decision whether to do so would turn on the action of another state facing the same uncertainty. Internal consistency requires that there be no possibility of multiple taxation if the formula were applied in every state. The Minnesota credit provision fails this test.

Moreover, even if the credit prevented multiple taxation, it arguably would not result in fair apportionment. "The reason why it is important not to confuse a credit with the *apportionment* of a tax base is that the fair *apportionment* requirement is directed at broader concerns. Wholly apart from its role in preventing multiple taxation, the fair *apportionment* criterion serves to limit the territorial reach of state power by requiring that the *state's tax* base corresponds to the taxpayer's in-state presence." Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 186 (1988) (emphasis in original) [hereinafter "Hellerstein article"].

Goldberg, 488 U.S. at 260-61). *See also Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 135 (1931) (a state may not extend the territorial reach of its taxing power "out of all appropriate proportion to the business transacted . . . in that State"); *Norfolk & Western Ry. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317, 325 (1968) (a state cannot "project [its] taxing power . . . plainly beyond its borders").

As the four-part *Complete Auto Transit* test makes clear, one of the animating purposes of the Dormant Commerce Clause is to prevent states from over-reaching and encroaching on the tax base, and tax policy decisions, of other states. In enforcing the strictures of the Commerce Clause, this Court "act[s] as a defense against state taxes which, whether by design or inadvertence . . . attempt to capture revenues that, under the theory of the tax, belong of right to other jurisdictions." *Trinova Corp.*, 498 U.S. at 386. Here, Minnesota has displayed precisely the enthusiasm for extraterritorial revenue collection that the Commerce Clause was intended to prevent.

The State of Nevada, like six other states from around the country, has chosen not to impose a personal income tax.[6] This judgment reflects Nevada's effort to compete with other states to attract residents and businesses. This Court has endorsed such competitive efforts, recognizing that "States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 n.15 (1994); *see also Zobel v. Williams*, 457 U.S. 55, 67 (1982) (Brennan, J., concurring). Indeed, it is through these means that "one State

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[6] The other six states are: Alaska, Florida, South Dakota, Texas, Washington, and Wyoming. *State Tax Handbook*, Commerce Clearing House, at 222 (2000).

may attract citizens of other States to join the numbers of its citizenry." *Zobel*, 457 U.S. at 68 (Brennan, J., concurring).

In this case, however, Minnesota has effectively nullified Nevada's decision to refrain from imposing a personal income tax. By taxing 100% of a Nevada resident's income from business earned in interstate commerce, Minnesota has impinged on Nevada's tax base and has thwarted Nevada's efforts to attract citizens by offering a low tax burden. Nevada has chosen to grant a benefit to its citizens by not taxing income earned in interstate commerce in Nevada; it did not choose to grant a benefit to the State of Minnesota by allowing Minnesota to tax income that Nevada has chosen not to tax.[7] In short, there is an underlying conflict among the states in this case. When one state chooses to forego a tax on income, it does not intend to forfeit its tax base to another state. The Commerce Clause guards against this sort of over-reaching.

Minnesota's expansive notion of taxation also runs afoul of the Commerce Clause because it is aimed at non-domiciliaries who, as non-citizens, lack the ability to seek political redress in Minnesota. As this Court noted in *Goldberg v. Sweet*, the Commerce Clause protects out-of-state persons, who "would have difficulty effecting legislative change," as opposed to "insider[s]" who "presumably [are] able to complain about and change the tax through the . . . political process." 488 U.S. at 266; *see also South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984) ("[W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints

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[7] Moreover, by not taxing income, Nevada must compensate for the foregone revenue by imposing or increasing other taxes. As Nevada residents, the Stelzners pay these other taxes, such as sales and property taxes, to Nevada. Minnesota, however, provides no credit for these taxes paid in Nevada.

which are normally exerted on legislation where it affects adversely some interests within the state.") (quoting *South Carolina State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 184-85 n.2 (1938)). Here, where Minnesota has demonstrably failed to acknowledge the interests of nondomiciliary "residents" such as the Stelzners, the Constitution requires judicial intervention.

B. State Supreme Courts Have Failed To Enforce The Protections Of The Dormant Commerce Clause In Cases Involving Taxation Of Nondomiciliary "Residents"

1. *The Decision Below*

In the decision below, the Minnesota Supreme Court sidestepped the serious constitutional issues that are raised, holding that the Commerce Clause is inapplicable because the Stelzners' business did not have a sufficient connection to interstate commerce. (Pet. App. 10a). This holding, while perhaps expedient, is plainly wrong. Indeed, it is irreconcilable with the undisputed factual record, and flies in the face of more than a half-century of this Court's Commerce Clause jurisprudence.

As this Court has recently reiterated, "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation [under the Dormant Commerce Clause] as when relied on to support some exertion of federal control or regulation." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 574 (1997) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979)). Moreover, it has been settled law, at least since *Wickard v. Filburn*, 317 U.S. 111 (1942), that even when an individual's acts do not, by themselves, affect the national economy, the Commerce Clause is nonetheless implicated when the *cumulative* effect of all similar individual activity would have an impact on the economy as a whole. *See id.* at 127-28; *see also United*

States v. Lopez, 514 U.S. 549, 616 (1995) (Breyer, J., dissenting); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

Here, the record unquestionably establishes that the Stelzners' business, either individually or aggregated with all similar businesses, substantially affects interstate commerce. The Stelzners were major participants in the multi-state and international market for foreign currency; at one point, they serviced approximately 85% of an identifiable market, *i.e.*, the foreign exchange market generated by the American casino industry. They faced significant competition in this market from local, regional, national, and international businesses, including banks and foreign exchange houses. The foreign currency exchange business clearly affects, and is affected by, interstate commerce. For example, currency exchange rates and interest rates, which are inextricably intertwined with interstate commerce, play a significant role in foreign currency exchange.

Given these facts, the decision below simply cannot be squared with the prior Commerce Clause decisions of this Court. Indeed, on a record as clear-cut as this one, the holding of the Minnesota Supreme Court only underscores the need for federal judicial intervention by this Court. States cannot be trusted to vindicate the Dormant Commerce Clause at the expense of their own parochial interests.[8]

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[8] The Minnesota Supreme Court's analysis was also flawed because it did not focus on the Stelzners' business activity and its nexus to interstate commerce, finding the "level and location" of their business activity "irrelevant." (Pet. App. 9a). Instead, the court focused on whether the tax itself, as applied solely to the Stelzners, burdened their ability to compete in interstate commerce. The proper analysis was to focus on the *business activity's* impact on interstate commerce, aggregating all similar individual activity as part of this analysis. *See Wickard v. Filburn*, discussed *supra* in text. But even if the tax itself were to be the focus of the analysis, the tax clearly affects the price the Stelzners can pay for

2. *The Issue Presented Here Has Arisen In Other States*

In *Tamagni v. Tax Appeals Tribunal*, 695 N.E.2d 1125, 91 N.Y.2d 530, 673 N.Y.S.2d 44 (N.Y. 1998) *cert. denied*, 525 U.S. 931 (1998), New York's highest court considered a virtually identical issue. The New York court held, over a strong dissent, that the Dormant Commerce Clause did not preclude New York from taxing 100% of the income of an individual who was domiciled in New Jersey. In *Tamagni*, the taxpayer, who was domiciled in New Jersey, owned an apartment and worked in New York City. The State of New York determined that the taxpayer was a "resident" of New York, and imposed a tax on 100% of his income, even though he was a New Jersey domiciliary. The taxpayer argued that New York's failure to provide a credit for income taxes paid to other states on investment income from intangible personal property subjected him to potential double taxation in violation of the Dormant Commerce Clause. *Id.* at 1127, 91 N.Y.2d at 533, 673 N.Y.S.2d at 48.

Following the same, unsatisfactory path as the Minnesota Supreme Court, the New York Court of Appeals held that the Commerce Clause was inapplicable because the New York tax statute did not substantially affect interstate commerce. *Id.* at 1130, 91 N.Y.2d at 538, 673 N.Y.S.2d at 49. In the alternative, the New York majority held that even if the Commerce Clause did apply, the *Complete Auto Transit* test was inapplicable because New York's taxation scheme did "not operate to the disadvantage of any identifiable interstate market, but rather simply taxe[d] residents based on their status as residents." *Id.* at 1131, 91 N.Y.2d at 540, 673 N.Y.S.2d at 50. The majority attempted to bolster this questionable line of reasoning by invoking what it described

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currency, and when applied to all similar individual activity would clearly impact prices in the interstate market for foreign currencies.

as "the fundamental State sovereignty interest at stake." *Id.* at 1134, 91 N.Y.2d at 544, 673 N.Y.S.2d at 53.

In dissent, Judge Titone persuasively attacked the majority's analysis. As an initial matter, he criticized the majority for seeking to use "labels" to avoid the Commerce Clause. *Id.* at 1135, 91 N.Y.2d at 546, 673 N.Y.S.2d at 54 (Titone, J., dissenting). As Judge Titone pointed out, "the case law is replete with examples" where in-state taxes were held to substantially affect interstate commerce, and "the movement of people across State borders for economic purposes has previously been held to implicate interstate commerce." *Id.* Turning to the *Complete Auto Transit* test, Judge Titone concluded that the New York tax scheme failed to satisfy the requirement of fair apportionment. *Id.* at 1138, 91 N.Y.2d at 548, 673 N.Y.S.2d at 55-56. Finally, Judge Titone rejected the majority's effort to invoke state sovereignty interests, noting that the primary decision relied upon by the majority, *National League of Cities v. Usery*, 426 U.S. 833 (1976), was subsequently overruled by this Court. *Id.* at 1139, 91 N.Y.2d at 552, 673 N.Y.S.2d at 58.

Tamagni illustrates the national significance of the question presented in this case, and further demonstrates that state courts can be expected to protect their own parochial interests at the expense of the national values embodied by the Commerce Clause.

C. State Apportionment Rules Provide A Potential Mechanism For Vindicating The Dormant Commerce Clause

The law already contains methods for apportionment of an individual taxpayer's income among multiple jurisdictions. In many instances, credit provisions such as Minnesota's may be adequate to ensure compliance with the Commerce Clause.[9] *See Goldberg*, 488 U.S. at 264; *D.H. Holmes Co. v.*

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[9] As discussed previously, however, credits do not necessarily result in fair apportionment. *See* Hellerstein article, *supra* note 5.

McNamara, 486 U.S. 24, 31 (1988). Alternatively, apportionment mechanisms for business taxation can be applied to individual income taxation. For example, Minnesota has a system for apportioning the income of corporations doing business in Minnesota. Minn. Stat. § 290.17. Under Minnesota's apportionment statute, sales and wages are weighted 70% and 15%, respectively, in determining the proper apportionment of income. Minn. Stat. § 290.191. The other 15% weighting is based on the location of the entity's business assets. Prior to 1987, Minnesota's apportionment rule applied to nondomiciliary individuals as well as corporations. *See* Minn. Stat. § 290.17 (1986) and Minn. Stat. § 290.19 (1986). There is no reason that the rule could not, once again, be applied to individuals in order to avoid violation of the Commerce Clause. *Cf. Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 219 (1980) ("[I]t has long been settled that the entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs.") (internal quotations omitted).

Currently, taxpayers such as the Stelzners have no way to apportion their income even though their business has a minimal nexus to Minnesota. To the contrary, Minnesota denies any apportionment to nondomiciliary residents such as the Stelzners and instead taxes 100% of their income generated from interstate commerce. Clarification is needed regarding the federal constitutional limits on taxation schemes such as Minnesota's.[10]

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[10] In *Hans Rees' Sons v. North Carolina*, 283 U.S. 123 (1931), the Court found that a corporate presence in the state for 365 days a year and its ownership and maintenance of a manufacturing facility in the state was not justification for the state to tax business income generated outside of the state. The Court found that the state's statutory scheme to tax the business' income "operated unreasonably and arbitrarily, in attributing to

CONCLUSION

The issue presented by this case is broadly significant, wrongly decided below, recurring, and ripe for resolution by this Court. This case presents an opportunity for this Court to resolve the conflict among the states, to harmonize the two lines of decisions of this Court, and to clarify the apportionment requirements for taxation of individuals who earn income from interstate commerce and who face potential individual tax liability in multiple states. Although no split of authority exists with respect to the issue raised here, no split is likely to arise because other state courts are likely to follow the same path of least resistance carved out by the courts of New York and Minnesota. In other words, absent intervention by this Court, state courts will continue to ignore the dictates of the Dormant Commerce Clause and will, thereby, trample the rights of individual taxpayers as well as the interests of sister states and the national government.

North Carolina a percentage of income out of all appropriate proportion to the business transacted by the appellant in that State. In this view, the taxes as laid were beyond the State's authority." *Id.* at 135. Minnesota's taxation of 100% of the Stelzners' trade or business income is at least equally unreasonable and arbitrary if not even more out of proportion than the tax in *Hans Rees*. North Carolina's apportionment statute apportioned 80% of the company's income to North Carolina while the amount actually attributable to North Carolina was only 22%. Minnesota is claiming 100% of the Stelzners' business income while the amount actually attributable to Minnesota under the apportionment formula, available for use by all other business entities, would be no more than 15% even if the Stelzners had located *all* their business assets in Minnesota.

Respectfully submitted,

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APPENDICES

APPENDIX A

[February 8, 2001, Filed]

SUPREME COURT OF MINNESOTA

621 N.W. 2d 736; 2001 Minn. LEXIS 41

C0-00-715

DONALD G. STELZNER, *et al.*, RELATORS,

vs.

COMMISSIONER OF REVENUE,

Respondent.

DISPOSITION:
Affirmed.

JUDGES:
BLATZ, Chief Justice.

OPINION BY:
BLATZ

OPINION:

Considered and decided by the court en banc without oral argument.

BLATZ, Chief Justice.

Relators Donald and Donna Stelzner appeal from the Minnesota Tax Court's decision affirming an order of the Commissioner of Revenue assessing Minnesota state income taxes, penalties, and interest for each of the taxable years

from 1987 through 1993. On appeal to the tax court, the Stelzners argued that they were domiciled in Nevada, not Minnesota, and raised federal constitutional issues challenging the tax assessment. In the alternative, the Stelzners argued that the commissioner should be equitably estopped from collecting the taxes, penalties, and interest and that they had shown reasonable cause to support abatement of late filing and late payment penalties. The tax court found that the Stelzners were nondomiciliary residents under *Minn. Stat.* § 290.01, subd. 7(2) (2000), the nondomiciliary resident statute. In addition, the tax court concluded that application of the nondomiciliary resident statute to tax the Stelzners' entire income does not implicate the Commerce Clause and rejected the Stelzners' other constitutional challenges, equitable estoppel claim, and abatement arguments. In this appeal, the Stelzners assert that, as nondomiciliary residents, Minnesota's taxation of their income earned primarily in interstate commerce violates the Commerce Clause of the United States Constitution. In the alternative, the Stelzners argue that good faith reliance on their tax preparer to file all necessary returns constitutes reasonable cause to abate late filing and late payment penalties. We affirm.

The essential facts underlying this case are not in dispute. Donald and Donna Stelzner were born and raised in Minnesota and were married in Nevada in 1958. The Stelzners worked in various positions in the gaming industry and also engaged in acquiring, improving, and selling residential property in Nevada and Minnesota, including a residence located on West Calhoun Parkway in Minneapolis, Minnesota. The Stelzners resided there from 1983 until mid-1999, during which time the Stelzners spent more than $400,000 remodeling and expanding the property. From 1983 through 1993, the Stelzners received homestead status for the West Calhoun Parkway property. During the 1987 through 1993 audit period, the Stelzners also occupied a studio condominium in Las Vegas, Nevada.

The Stelzners spent the majority of their time in Minnesota during the audit period, with Donald Stelzner spending approximately 300 or more days per year and Donna Stelzner spending more than 350 days per year. Nonetheless, the Stelzners considered themselves residents and domiciliaries of Nevada and maintained Nevada drivers' licenses and voter registration. An audit of the Stelzners' 1984 tax return by the Internal Revenue Service determined that the Stelzners were domiciliaries of Nevada for federal tax purposes and allowed office and other "away from home" expense deductions for the West Calhoun Parkway property.

In the 1970's, Donald Stelzner developed a foreign currency exchange business serving the casino industry in New Jersey, Illinois, Nevada, some Native American tribal lands, and the Canadian Province of Ontario. The resulting companies, Bond Mortgage Forex and Bond Mortgage New Jersey, are Nevada-based general partnerships with the Stelzners as the only partners. At their high point, the Stelzners' business operation accounted for approximately 85 percent of the foreign currency exchange generated by the Nevada and New Jersey casino industry. Recently, competition from banks and exchange houses has significantly reduced the Stelzners' customer base.

Throughout the audit period, the Stelzners' income was generated primarily from this currency exchange business. Donald Stelzner traveled to client casinos, purchased the accumulation of client casinos' foreign currency with U.S. cash or cash equivalents, provided on-site inspection and verification, and arranged for transportation of the currency to foreign banks or other repositories. The Stelzners monitored currency accumulations and rates and consolidated currency for movement to foreign banks and exchange houses at a favorable exchange margin. In the interim, currency was secured in bank vault facilities or on properties owned or leased by the Stelzners, including the West Calhoun Parkway

property. During the audit period the Stelzners performed the monitoring functions primarily from Minneapolis. The actual currency transactions occurred primarily outside of Minnesota.

Because this mode of operation required Donald Stelzner to transport large amounts of U.S. and foreign currencies and negotiable instruments, safety was a major concern. The Stelzners believed that living outside the geographic area of client casinos increased their personal security. Minneapolis was chosen, in part, because the Stelzners believed that Minneapolis would be viewed as an inconvenient and unlikely location for routing foreign currency. The Stelzners also recognized that Minneapolis was well-suited for their business given the location of the Minneapolis/St. Paul airport and the Federal Reserve Bank. Based on these considerations of security and convenience, the Stelzners purchased the West Calhoun Parkway property and made modifications to provide additional security.

In the early 1980's, the Stelzners hired Dale Korpi, an attorney and certified public accountant, to prepare their tax returns. Donald Stelzner gave Korpi two or three years of previous returns and explained that he and his wife were domiciled in Nevada, where no state income tax return is required, but had business purposes for being in Minnesota. As he had with previous tax preparers, Donald Stelzner informed Korpi that the Stelzners had no Minnesota income and had never filed a Minnesota tax return. This representation was consistent with Minnesota tax law because, at that time, Minnesota's definition of "resident" for individual income tax purposes excluded individuals domiciled in another state. *Minn. Stat.* § 290.01, subd. 7 (1986) (defining resident as "any individual domiciled in Minnesota and any other individual maintaining an abode therein *** who shall not *** have been domiciled outside the state").

In 1987, the definition of "resident" was amended to include "any individual domiciled outside the state who maintains a place of abode in the state and spends in the aggregate more than one-half of the tax year in Minnesota ***." Act of May 28, 1987, ch. 268 art. 1, § 10, 1987 Minn. Laws 1044-45 (codified at *Minn. Stat.* § 290.01, subd. 7(2) (2000)). Sometime during or after 1987, Korpi informed Donald Stelzner of an amendment to the Minnesota income tax law that modified the definition of resident. Stelzner testified in the tax court proceedings that he intended to follow up on the comment that a change had occurred, but did not pursue it any further. Korpi continued to file only federal returns for the Stelzners.

After an audit of the taxable periods from 1987 through 1993, the commissioner concluded that the Stelzners were nondomiciliary residents of Minnesota for each year of the audit period and issued an order finding the Stelzners liable for Minnesota income taxes, penalties, and interest for each of those years. The total amount assessed was $402,673.87. The Stelzners filed an administrative appeal, which the commissioner denied. The Stelzners appealed that determination to the Minnesota Tax Court.

Before the tax court, the Stelzners challenged the commissioner's assessment claiming that they were domiciliaries of Nevada, not Minnesota, and that application of *Minn. Stat.* § 290.01, subd. 7(2), the nondomiciliary resident statute, to tax their entire income violated the Commerce Clause, the Equal Protection Clause, and the Due Process Clause of the United States Constitution. In the alternative, the Stelzners argued the State should be equitably estopped from assessing the income taxes because the State provided false and misleading information and any penalties should be abated because the Stelzners could show reasonable cause for failing to file Minnesota income tax returns during the audit period.

Pursuant to the process outlined in *Erie Mining Co. v. Commissioner of Revenue*, 343 N W. 2d 261 (Minn. 1984), the tax court referred the Stelzners' federal constitutional issues to the Ramsey County District Court, and the district court subsequently transferred the issues back to the tax court for decision. The tax court affirmed the commissioner's determination assessing income tax liability for the Stelzners' entire income during the audit period. Because the tax court determined the Stelzners were nondomiciliary residents under *Minn. Stat.* § 290.01, subd. 7(2), it was not necessary to reach the issue of whether the Stelzners were domiciled in Nevada. In addition, the tax court found that Korpi informed the Stelzners about changes to the Minnesota income tax law modifying the definition of "resident." The tax court also concluded that application of the nondomiciliary resident statute to tax the Stelzners' entire income did not implicate the Commerce Clause, and rejected the Stelzners' other constitutional challenges, equitable estoppel claim, and abatement arguments. Following the trial, the tax court denied the Stelzners' motion to amend the findings of fact and judgment.

The Stelzners now appeal on writ of certiorari arguing that, as nondomiciiary residents, Minnesota's tax on their entire income generated primarily from transactions occurring outside of the state violates the Commerce Clause of the United States Constitution. In the alternative, the Stelzners argue that late filing and payment penalties should be abated because the Stelzners can show reasonable cause for failing to file Minnesota individual income tax returns.

I.

First, the Stelzners contend that, as applied to them, Minnesota's tax on nondomiciliary residents' entire individual income violates the Commerce Clause because their entire income is subject to state tax, even though the income is derived primarily from transactions in interstate

commerce. The tax court rejected the Stelzners' Commerce Clause argument, and we review this legal conclusion of the tax court de novo. *Nagaraja v. Comm'r of Revenue*, 352 N W. 2d 373, 376 (Minn. 1984).

The income tax obligation the Stelzners challenge results from the application of three statutes: *Minn. Stat.* §290.01, subd. 7(2), which defines the Stelzners as nondomiciliary residents; *Minn. Stat.* § 290.014, subd. 1 (2000), which provides that the entire net income of resident individuals will be taxed; and *Minn. Stat.* § 290.17, subd. 1(a) (2000), which excludes resident individuals from the allocation rules allowing apportionment of income among the states where the income was generated. The combined effect of these statutes subjects the Stelzners' entire income to Minnesota state income tax. The Stelzners argue this places a disproportionate state tax burden on income earned primarily through transactions occurring outside of Minnesota in violation of the Commerce Clause. [1]

The Commerce Clause states that "the Congress shall have power *** To regulate commerce *** among the several states." U.S. Const. art. I, § 8, cl. 3. While the express language is an affirmative grant of power to Congress, the Commerce Clause has long been held to implicitly limit the states' power to regulate interstate commerce. *Quill Corp. v. North Dakota*, 504 U.S. 298, 309, 312, 119 L. Ed. 2d 91, 112 S. Ct. 1904 (1992). This negative implication, known as the "dormant" Commerce Clause, bars state action that discriminates against or places an undue burden on interstate commerce. *Quill Corp.*, 504 U.S. at 310, 312.

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[1] Because the Stelzners claim to be domiciled in Nevada, where there is no individual state income tax, there is no issue of multiple taxation in this case. While not applicable in the instant case, we note that *Minn. Stat.* § 290.06, subd. 22 (2000) protects nondomiciiary residents from multiple taxation by allowing a credit for income taxes paid to the domicile jurisdiction to offset Minnesota income tax liability.

Commerce Clause challenges require a two-step inquiry. First, we must determine whether application of Minnesota's nondomiciliary resident statute to tax the Stelzners' entire income implicates the Commerce Clause. *Luther v. Comm'r of Revenue*, 588 N.W.2d 502, 510 (Minn.), *cert. denied*, 528 U.S. 821, 120 S. Ct. 66, 145 L. Ed. 2d 57 (1999). If so, the second question is whether the Commerce Clause is violated. *Luther*, 588 N.W.2d at 510-11. Because states have wide latitude in establishing their taxation schemes, and statutes will be declared unconstitutional only when absolutely necessary, the Stelzners bear a heavy burden at each step of the inquiry. *Id.* at 508.

In order to show that the Commerce Clause is implicated, the Stelzners must demonstrate that Minnesota's taxation of their entire income has a "substantial effect on an identifiable interstate economic activity or market." *Luther*, 588 N.W.2d at 511. "The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997). Therefore, the dormant Commerce Clause will not apply unless there is actual or prospective competition between entities in an identifiable market *and* state action that either expressly discriminates against or places an undue burden on interstate commerce. *Tracy*, 519 U.S. at 300. Furthermore, this impact must be more than merely incidental. *United States v. Lopez*, 514 U.S. 549, 559, 131 L. Ed. 2d. 626, 115 S. Ct. 1624 (1995).

We recently addressed a Commerce Clause challenge to Minnesota's nondomiciliary resident statute in *Luther v. Commissioner of Revenue*, 588 N.W.2d at 510-12. In *Luther*, the taxpayer was a Florida domiciliary who owned a home in Minnesota and also spent time in Minnesota to attend board of directors' meetings for a Minnesota corporation. 588 N.W.2d at 504-05. The commissioner determined that Luther was a nondomiciliary resident under *Minn. Stat.* § 290.01,

subd. 7(2), because she owned a home in Minnesota and spent more than one-half of the tax year here. *Luther*, 588 N.W.2d at 505. We affirmed Luther's status as a nondomiciliary resident and rejected Luther's Commerce Clause argument that Minnesota's nondomiciliary resident statute taxed her right to interstate travel. *Luther*, 588 N.W.2d at 511-12. In upholding the application of the tax to her income we recognized that it was not Luther's movement across state lines, but her worldwide net income that was being taxed because "through her substantial contacts with Minnesota, she availed herself of the many services, benefits, and protections provided to her by Minnesota." 588 N.W.2d at 511. Conduct that occurred solely in Minnesota—her presence in the state for more than one-half the year and ownership of an abode in the state—triggered Minnesota income tax liability, and application of the nondomiciliary resident statute to Luther did not implicate the Commerce Clause. *Luther*, 588 N.W.2d at 512.

The commissioner contends that *Luther* is dispositive here, and the Stelzners' income was taxed solely on the basis of their undisputed nondomiciliary resident status. As such, the level and location of the Stelzners' business activity is irrelevant, the tax does not substantially affect interstate commerce, and the Commerce Clause is not implicated. In contrast, the Stelzners argue that basing taxation on a taxpayer's status as a Minnesota resident does not shield the tax from Commerce Clause scrutiny. The Stelzners also attempt to distinguish *Luther*, arguing that they are major participants in a significant and competitive multi-state and international market, while the only interstate activity in *Luther* was interstate travel. However, even if we were to accept this distinction, the Stelzners have failed to show how this application of the nondomiciliary resident income tax operates to discriminate against or unduly burden interstate commerce.

The Stelzners contend that the tax placed on income generated outside of Minnesota implicates the Commerce Clause because it burdens their ability to continue as major participants in a competitive interstate market. While the Stelzners argue that Minnesota's taxation of their entire individual resident income is out of proportion to the actual income-generating activities occurring in Minnesota, the Stelzners have not shown anything more than an incidental impact on their cost of doing business in interstate commerce. This is not sufficient evidence of either discrimination against or an undue burden on interstate commerce to implicate the Commerce Clause. Because we hold that the Stelzners have failed to show that the Commerce Clause is implicated here, we need not reach the question of whether Minnesota's tax on the Stelzners' entire income violates the Commerce Clause.

II.

Finally, the Stelzners argue that their penalties should be abated because they have shown reasonable cause for failure to file returns during the audit period. The commissioner has the discretion to abate penalty charges "if in the commissioner's opinion the failure to timely pay the tax or failure to timely file the return is due to reasonable cause." *Minn. Stat.* § 270.07, subd. 1(e) (2000). The tax court affirmed the commissioner's determination of penalties and interest. In reviewing the tax court's section 270.07 reasonable cause finding, we determine whether sufficient evidence exists to support the tax court's decision. *Fridlund Sec. Co. v. Minn. Comm'r of Revenue,* 430 N. W.2d 154, 166 (Minn. 1988).

The Stelzners contend their good faith belief that they were not required to file a Minnesota income tax return, combined with reliance on their tax preparer to prepare all necessary returns, constitutes reasonable cause. In support, the Stelzners cite to *United States v. Boyle,* in which the United States

Supreme Court determined that "when an accountant or attorney *advises* a taxpayer on a matter of tax law, such as whether liability exists, it is reasonable for the taxpayer to rely on that advice." 469 U.S. 241, 251, 105 S. Ct. 687, 83 L.Ed.2d 622 (1985). The Stelzners argue *Boyle* applies because they relied on Korpi's advice that a Minnesota return was not needed. While the Stelzners did not explicitly ask for and receive tax advice on this matter, they maintain that the "advice" took the form of Korpi's conduct—specifically, his failure to prepare a Minnesota return when he knew the Stelzners' circumstances and knew of the tax law change.

In further support of their reasonable cause argument, the Stelzners point to the Third Circuit Court of Appeals' decision in *Hatfried, Inc. v. Comm'r of Internal Revenue*, 162 F.2d 628, 631-35 (3d Cir. 1947), in which the court discussed reasonable cause language for penalties arising from failure to file a particular federal tax return. In *Hatfried*, the court determined that it was reasonable for a taxpayer to rely on an accountant's advice. *Id.* at 635. In doing so, the court inferred that a misstatement on a tax return must have been "made on the accountant's advice and in reliance upon that advice" because the regular accountant for the taxpayer had prepared the return knowing all the facts and circumstances. *Id.* at 632. This inference of reliance on the accountant's advice allowed the court to reach the legal conclusion that the taxpayers had shown reasonable cause. *Id.* at 635.

The Stelzners urge us to likewise conclude that they reasonably relied on Korpi's "advice" in depending on him to file the necessary tax returns. However, a critical difference exists between this case and *Hatfried*. Here, the tax court found that Korpi "informed [the Stelzners] about amendments to the Minnesota income tax law modifying the definition of 'resident' for state income tax purposes." *Stelzner v. Comm'r of Revenue*, 2000 Minn. Tax LEXIS 3, No. 7005, 2000 WL 37865, at *2 (Minn. T.C. Jan. 12, 2000). This factual finding

defeats the Stelzners' reasonable cause argument, because, as *Korpi informed the* Stelzners of a relevant law change, it was not reasonable for them to disregard Korpi's statement and continue in the belief that no Minnesota return was necessary. Without reliance on their tax preparer's advice, the Stelzners cannot make a reasonable cause argument under *Boyle*.

We will not disturb the tax court's finding that Korpi informed the Stelzners of a relevant income tax law change if the record contains sufficient evidence to support the finding. *F-D Oil Co. v. Comm'r of Revenue*, 560 N. W. 2d 701, 704 (Minn. 1997). Donald Stelzner was asked at trial whether there was "any further discussion of law changes in Minnesota, in or about 1987, relating to the legal definition of Minnesota residency." In response, Donald Stelzner acknowledged that Korpi had mentioned a Minnesota law change that the two needed to discuss. Having heard Donald Stelzner's testimony, the tax court found that Korpi informed the Stelzners in general terms of a modification to the term "resident" in the state income tax law. *Stelzner, 2000 Minn. Tax LEXIS 3*, *5, 2000 WL 37865, at *2. The Stelzners advance a different interpretation of the testimony, arguing that Donald Stelzner's response was seasoned by the audit and years of appeals on the matter, and only indicates that Donald Stelzner was aware that some law had been changed. However, "the tax court is in the best position to assess the credibility and sincerity of witnesses." *F-D Oil Co.*, 560 N. W.2d at 706. Accepting this factual finding, there is sufficient evidence in the record to support the tax court's determination that the Stelzners cannot show reasonable cause for their failure to file Minnesota state income tax returns during the audit period; therefore, penalty abatement is not warranted.

The Stelzners have failed to demonstrate that Minnesota's taxation of their entire nondomiciliaiy resident income earned primarily from their multi-state and international business

operation implicates the Commerce Clause; therefore, we affirm the decision of the tax court. Furthermore, there is sufficient evidence in the record to support the tax court's determination that the Stelzners have not shown reasonable cause for penalty abatement and to affirm the commissioner's assessment of penalties and interest.

Affirmed.

APPENDIX B

MINNESOTA TAX COURT
COUNTY OF RAMSEY
REGULAR DIVISION
2000 Minn. Tax LEXIS 3

Docket No. 7005

DONALD G. AND DONNA M. STELZNER,
Appellants,

vs.

COMMISSIONER OF REVENUE,
Appellee.

January 12, 2000, Decided

COUNSEL: For the Appellants, Thomas M. Regan. Attorney at Law, Regan & Vincent PLC.

For the Appellee, Craig R. Anderson, Assistant Attorney General.

JUDGES: Raymond R. Krause, Judge.

OPINION BY: Raymond R. Krause

OPINION:

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

The Honorable Raymond R. Krause, Judge of the Minnesota Tax Court, heard this matter on October 4, 1999 at the Minnesota Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota.

Thomas M. Regan, Attorney at Law, Regan & Vincent PLC, represented the Appellants.

Craig B. Anderson, Assistant Attorney General, represented the Appellee.

The issue in this case is the application of Minn. Stat. § 290.01, subd.7, (the "Nondomiciliary Resident Statute") to the Appellants' worldwide income.

Both parties submitted post trial briefs. The matter was submitted to the Court for decision on January 3, 2000.

The Court, having heard and considered the evidence adduced at the hearing, and upon all of the files, records and proceedings herein, now makes the following:

FINDINGS OF FACT

1. Appellants Donald and Donna Stelzner are husband and wife. Both were born and raised in Minnesota but married in Nevada in 1959. Beginning in the late 1950's, Appellants worked various jobs in the gaming industry in Nevada. During this same period, Donald Stelzner and his father formed a Minnesota corporation which was later discontinued.

2. From the 1960's onward, Appellants were engaged in acquiring, improving and selling residential property. Appellants lived in some, but not all, of these homes. The residences were located in both Nevada and Minnesota. Most pertinent to this case is the residence located at 3528 W. Calhoun Parkway in Minneapolis, Minnesota. Appellants resided at this location from 1983 until mid 1999. Appellants purchased this property on July 14, 1983 for $ 365,568. It is a 6,500 square foot home with 21 rooms, five bedrooms, cooking, sleeping and bathing facilities and other amenities. Appellants stipulated that the W. Calhoun Parkway property was an investment which they would improve and eventually sell.

3. From 1987 to 1993 ("the Audit Period"), the assessed value of the W. Calhoun Parkway property ranged from

$ 365,000 in 1987 to $ 575,000 in 1992. As of 1999, its assessed value was $ 797,500. Between 1985 and 1999, Appellants spent more than $ 400,000 to remodel and improve the home.

4. Appellants' other residence during the Audit Period was a studio condominium in Las Vegas, Nevada. Appellants rented the condominium from 1979 to May of 1993. In May of 1993 Appellants purchased the unit. The assessed value of the condominium for each year during the Audit Period was $ 78,200.

5. During the Audit Period, Appellants spent the vast majority of their time in Minnesota. Mr. Stelzner spent 300 or more days per year in Minnesota. Mrs. Stelzner averaged over 350 days per year in Minnesota.

6. Appellants maintained Nevada drivers licenses and Nevada voter registrations. Their motor vehicles were registered in Nevada and Minnesota and Oregon. Mrs. Stelzner received all medical and dental care in Minnesota. Mr. Stelzner received dental care in Nevada and all other medical services in Minnesota.

7. During the Audit Period, Mr. Stelzner maintained a Minnesota real estate broker license.

8. In the 1970's, Appellants developed a foreign currency exchange business serving the casino industry in Nevada and New Jersey. During the Audit Period, Appellants based their foreign exchange business in their Minnesota home. Mr. Stelzner testified that his method of operation was to monitor, on a day-to-day basis, the needs of his client casinos. When enough casinos in a given location had accumulated sufficient foreign currency (predominantly Canadian), Mr. Stelzner would travel from Minneapolis to the location of the casinos to pick up the currency each casino wanted to dispose of. After making a trip to the casino to pick up the currency, Mr. Stelzner would return to Minneapolis and monitor the

exchange rates of the currencies. Mr. Stelzner would monitor the foreign exchange rates in order to maximize his return on the transaction and at the proper moment, transport the currency to a Canadian bank for exchange.

9. Appellants testified that they consider Nevada their home and they intend to return to Nevada. They testified that they operate from Minnesota for security reasons. Mr. Stelzner's method of operation requires him to transport large sums of money on his person. Appellants believe that living in close proximity to so many of the client casinos would create undesirable security risks or cause Mr. Stelzner to significantly alter his methods of operation by increasing security precautions. Appellants believe these risks, or the attendant costs of changing methods of operation, would be lower if they were generally considered Minnesota residents.

10. From 1983 through 1992, Appellants applied for and obtained homestead tax treatment for their W. Calhoun Parkway home in Minneapolis. The Minneapolis City Assessor continued to extend homestead tax classification to this property through 1995.

11. In 1984, the IRS audited Appellants. Appellants' domicile was a material issue in the audit. The IRS concluded that Appellants were Nevada domiciliaries for federal tax purposes.

12. Appellants filed no Minnesota income tax return for any year in the Audit Period. In 1987, Appellants' Minnesota tax advisor informed Appellants about amendments to the Minnesota income tax law modifying the definition of "resident" for state income tax purposes.

13. Appellants satisfied the definition of "resident" found in the Nondomiciliary Resident Statute and were therefore nondomiciliary residents during the Audit Period.

CONCLUSIONS OF LAW

1. The Order of the Commissioner of Revenue dated October 31, 1997, imposing income tax, penalties and interest is hereby affirmed.

LET JUDGMENT BE ENTERED ACCORDINGLY, THIS IS A FINAL ORDER. A STAY OF 15 DAYS IS HEREBY ORDERED.

BY THE COURT,
Raymond R. Krause, Judge
MINNESOTA TAX COURT

DATED: January 12, 2000

MEMORANDUM

Appellants, although originally Minnesota natives, moved to Nevada some years before the Audit Period, began work in the gaming industry and were married in Nevada. They did however, continue to maintain various business and personal contacts with Minnesota.

In 1975 Appellants developed a business which served the casino industry by purchasing foreign currency (primarily Canadian) from the casinos and trading it at a profit to various Canadian banks for U.S. currency. During the Audit Period, the Appellants operated this business from a home/office in Minnesota. They continued, during the Audit Period, to rent an apartment in Nevada which they claim as their home.

On July 20, 1995, after an audit of the state income tax liabilities of Appellants, the Commissioner issued an order determining that Appellants were liable for Minnesota income taxes, penalties and interest for each of the seven taxable years from 1987 through 1993.

Appellants contend that they are Nevada domiciliaries and therefore are not subject to Minnesota income tax. They

argue further that even if considered nondomiciliary residents of Minnesota, the application of the Nondomiciliary Resident Statute to their income from interstate commerce violates the Commerce Clause, the Due Process Clause and the Equal Protection Clause of the United States Constitution.

Section 290.014, subd. 1, provides: "all net income of a resident individual is subject to tax under this chapter." The Nondomiciliary Resident Statute defines "resident" for purposes of chapter 290 to mean: "(1) any individual domiciled in Minnesota . . . and (2) any individual domiciled outside the State who maintains a place of abode in the State and spends in the aggregate more than one-half of the tax year in Minnesota . . . ."

Domicile

Minn. R. 8001.0300, subp. 2 (1997) defines domicile as:

> the bodily presence of an individual person in a place coupled with an intent to make such place one's home. The domicile of any person shall be that place where habitation is fixed, without any present intention for removal therefrom and to which, whenever absent, that person intends to return . . . . A domicile once shown to exist is presumed to continue until the contrary is shown.

The facts in this case can be construed to demonstrate intent by the Appellants to create a home in Nevada or maintain their domicile in Minnesota prior to and during the Audit Period. The Appellants maintain that their intent is to return to Nevada as soon as they can. They testified that they expect the large banks to crowd them out of the casino currency business and that they would then go back to their old occupations in the casino industry. Other facts such as the purchase of a $ 365,000 home in Minnesota and spending most of the year in Minnesota during the entire Audit Period, indicate a different intent.

The question before us is however, not simply one of domicile. We do not need to reach the issue of domicile if Appellants qualify as residents under the second part of the definition.

Nondomiciliary Resident

For purposes of Chapter 290, the Nondomiciliary Resident Statute defines "resident" to mean "any individual domiciled outside the state who maintains a place of abode in the state and spends in the aggregate more than one half of the tax year in Minnesota . . . . The term "abode" means a dwelling maintained by an individual, whether or not owned by the individual and whether or not occupied by the individual, and includes a dwelling place owned or leased by the individual's spouse."

Appellants in this case maintained a five-bedroom home in Minnesota throughout the period under review. Appellants stipulated that they spent over 300 days per year in the Minnesota home during that period. Appellants slept in the home, ate in the home, received mail and made improvements to the home. The fact that they considered the Nevada studio apartment to be their primary residence is not relevant in an analysis under the Nondomiciliary Resident Statute. Unlike the definition of domicile, there is no intent requirement in the statute. We find Appellants to be nondomiciliary residents under the Nondomiciliary Resident Statute.

Commerce Clause

We next turn to the constitutionality of the application of the Nondomiciliary Resident Statute to Appellants. This Court does not have original jurisdiction over constitutional issues. However, this case was transferred from District Court to the Tax Court using the process outlined by the Minnesota Supreme Court in *Erie Mining Co. v. Commissioner of Revenue*, 343 N. W.2d 261 (Minn. 1984). The Tax Court therefore obtained jurisdiction over the constitutional issues. Appellants argue that application of the statute places a

burden on their ability to engage in interstate commerce thus violating the dormant Commerce Clause of the United States Constitution. U.S. Const. art. 1, sec.8, cl.3. Appellants bear the burden of proving beyond a reasonable doubt that the statute is unconstitutional under the Commerce Clause. *Caterpillar, Inc. v. Commissioner of Revenue*, 568 N. W.2d 695, 697-98 (Minn. 1997).

Following the analysis used by the Minnesota Supreme Court in *Luther v. Commissioner of Revenue*, 588 N. W.2d 502 (Minn. 1999), *cert. denied*, U.S. ___, 120 S. Ct. 66(1999), we must first determine whether the Commerce Clause is implicated at all. Appellants claim that the imposition of a Minnesota income tax on earnings derived from their foreign currency trading business would place an insurmountable and impermissible burden on their ability to engage in interstate commerce. They claim that almost all of the business takes place outside Minnesota in interstate commerce. They argue that the business depends on very narrow profit margins and that Minnesota's tax rate would significantly reduce or eliminate their ability to make a profit. This line of reasoning fails on several counts.

First, under this line of reasoning, any state's income tax would place a burden on Appellants' ability to profitably engage in this market. Whether Minnesota or Nevada or even Federal income tax is imposed, the resulting effect on a narrow profit margin is the same. That alone does not implicate the Commerce clause. The purpose of the dormant Commerce Clause is not "to protect state residents from their own state taxes." *Goldberg v. Sweet*, 488 U.S. 252, 109 S. Ct. 582 102 L. Ed. 2d 607 (1989).

Second, a tax is not unconstitutional because its imposition results in the reduction or elimination of profitability of any individual business. For there to be a Commerce Clause issue, application of the Nondomiciliary Resident Statute must substantially affect "an identifiable interstate economic

activity or market." *Luther v. Commissioner of Revenue*, 588 N. W. 2d at 511. Minnesota's tax would not foreclose the casino foreign currency market; it would have no affect on the market at all. The method by which Appellants choose to operate within that market would be admittedly less profitable, but that is a business operational decision not a Commerce Clause issue. For example, Appellants claim that they operate from Minnesota for security reasons. They admit that they could operate their business exclusively in Nevada thus avoiding any question of Minnesota income tax. This would however require, according to Mr. Stelzner, increased security costs for guards, armored cars, etc. The fact that they have chosen to trade security costs for tax costs does not make this a Constitutional issue. It remains a business and convenience decision. The tax itself does not impact the market or participants in the market as a result of their participation. This is an income tax on nondomiciliary residents, not a tax on foreign currency trading.

Third, we find that their business operations are located primarily in Minnesota. The real issue is stated clearly in *Luther*:

> Luther was required to pay Minnesota income tax on her net worldwide income because, through her substantial contacts with Minnesota, she availed herself of the many services, benefits and protections provided to her by Minnesota. The requirement that she pay Minnesota income tax was triggered by conduct that took place wholly within Minnesota and that did not substantially affect interstate commerce.

Luther v. Commissioner of Revenue, 588 N.W.2d at 511.

In this case, the Appellants run a foreign currency trading business out of their Minnesota home. They store cash-in-transit in the home. They make business travel arrangements from the Minnesota home. They follow the international

currency market on a daily and sometimes hourly basis by computer in theft Minnesota home. They make calls from their Minnesota home to the Nevada and New Jersey casinos to determine currency accumulations. In addition, Appellants stipulated that throughout the review period they purchased and improved property in Minnesota for investment purposes wholly apart from their currency business. In reality, the only business activities taking place outside Minnesota are the pick-ups and drop-offs of cash from the casinos and to the banks.

Appellants availed themselves of far more "services, benefits and protections" provided by Minnesota than did even Mrs. Luther. The basis for taxation, in this case, is these substantial activities and benefits occurring wholly within Minnesota. The tax is on the net income of Minnesota residents, not on the interstate commerce nor on the ability to make occasional trips outside the state to pick up or dispose of foreign currency.

We find that the Appellants have not met the burden of showing that the Commerce Clause is implicated by application of the Nondomiciliary Resident Statute.

Due Process

Appellants challenge the constitutionality of the Nondomiciliary Resident Statute as violative of the Due Process Clause of the United States Constitution. U.S. Const. amend. XIV. They argue that because individual taxpayers are not allowed to apportion income from non-Minnesota sources, the statute is unconstitutionally overreaching.

The Due Process Clause requires: 1) "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" and 2) a rational relationship between "the income attributed to the State for tax purposes [and the] values connected with the taxing State." *Quill Corp. v. North Dakota*, 504 U.S. 298, 306, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992).

In this case, many links, connections and contacts between Minnesota and the Appellants have already been demonstrated. We find ample links between Appellants and Minnesota to satisfy the first requirement of Due Process.

The second requirement focuses on a rational relationship between the income attributed to the state and the "values connected with the taxing state." *Quill Corp. v. North Dakota*, 504 U.S. at 306 (citing *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273, 98 S. Ct. 2340, 57 L. Ed. 2d 197 (1978)).

Again the Appellant must carry the burden of proof that there is no rational relationship between the income and the "values connected with the taxing state." *Id.* We find that the use of Minnesota as a base of operations, a safe haven, a real estate investment locale and a residence for over 300 days a year demonstrate a very healthy relationship between the income received and the "values connected with the taxing state." *Id.* This satisfies the second requirement of the Due Process Clause.

Appellants also raise the unitary business rule of apportionment as did the Appellant in *Luther*. Appellants, citing *Hans Rees' Sons v. North Carolina*, 283 U.S. 123, 51 S. Ct. 385, 75 L. Ed. 879 (1931), argue that the state may only tax a portion of the worldwide income of a business engaged in interstate commerce. We find the holding in *Luther* dispositive on this issue. In *Luther* the Minnesota Supreme Court stated:

> [t]he concern underlying the unitary business rule of apportionment is the risk of multiple taxation. However, individual taxpayers and corporate taxpayers may constitutionally be treated differently for tax purposes. Indeed, states may impose double taxation or any other form of unequal taxation on an individual taxpayer, so long as the inequality is not based on arbitrary distinctions. Moreover, even if the risk of multiple taxation of individual taxpayers was a due process

> concern, no such taxation would result here because Minnesota provides a credit for income tax paid to a nondomiciliary resident's state of domicile.

Luther v. Commissioner of Revenue, 588 N. W. 2d at 509, 510 (citations omitted). We find the application of the Nondomiciliary Resident Statute does not violate the Due Process Clause on these facts.

Equal Protection

Appellants challenge the application of the Nondomiciliary Resident Statute as violative of the Equal Protection Clause of the United States Constitution which provides: "nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Appellants argue that the treatment of nondomiciliary resident individuals who engage in interstate commerce is less favorable than the treatment of a corporation wherever domiciled which also engages in interstate commerce.

The creation of classifications for taxation by a state will be upheld if the state can show: 1) the legislation has a legitimate purpose; and 2) it was reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose. *Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 668, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981).

The purpose of the legislation in question is to tax the net income of residents of the state who meet certain criteria indicating a substantial connection to the state. This is a legitimate purpose. *Maguire v. Trefry*, 253 U.S. 12, 14, 40 S. Ct. 417, 64 L. Ed. 739 (1920). We therefore find the first requirement of equal protection met.

The legislature, in enacting the Nondomiciliary Resident Statute, carefully and explicitly set out the minimum contacts necessary to demonstrate sufficient connection with

Minnesota and thereby trigger the tax. The classification of nondomiciliary resident reasonably promotes the purpose of the legislation and therefore satisfies the second Equal Protection criterion. Again, as stated by the Minnesota Supreme Court in *Luther*, "individual taxpayers and corporate taxpayers may constitutionally be treated differently for tax purposes." We find as result, that the Nondomiciliary Resident Statute does not violate the Equal Protection Clause of the United States Constitution.

Equitable Estoppel

Appellants argue that if taxes are due, the Commissioner should be estopped from collecting those taxes, penalties or interest. Appellants assert that prior to 1985, the state did not specifically require a homeowner to be a Minnesota resident in order to claim homestead classification for one's property. They point out that when the law changed in 1985, the Minnesota residency requirement was made explicit. The Department of Revenue did not include notice of this requirement in the homestead application. Appellants argue that they were misled by the omission and, in reliance upon the old information, continued to reside in the State of Minnesota longer than they would otherwise. This, according to Appellants, directly contributed to their current tax liability.

"Even if the Court were to agree that the result is inequitable, the Tax Court is a creature of statute and has not been granted equity powers. The Court can grant equity relief only when such authority has been granted to the Commissioner and he has refused to exercise it." *Simon v. Commissioner of Revenue*, 1983 Minn. Tax LEXIS 107, Docket No. 3549 (Minn. Tax Ct. Feb. 10, 1983). The Commissioner has the power to abate penalties and interest when the result would be inequitable. Minn. Stat. § 270.07(e) (1998). The Commissioner does not have the power to abate taxes due. We do not therefore have the power to relieve

Appellants of their tax liability. We do not necessarily agree that this produces an inequitable result on these facts but find that we do not possess the power to abate the taxes in any event.

Penalties and Interest

Appellants argue that they relied on the belief that they could receive homestead status which caused them to stay in Minnesota longer than they would otherwise. They also argue that they reasonably relied on their tax preparer and the IRS determination of domicile in deciding not to file Minnesota returns. For these reasons, they argue, penalties and interest should be abated.

Mr. Stelzner testified that, had he known the W. Calhoun Parkway property was not eligible for homestead classification, he would not have embarked upon his remodeling and would have moved from Minnesota sooner. We do not find this claim supported by the facts. Appellants had for years been in the business of purchasing and fixing up for resale, various properties in Minnesota and Nevada. They did not live in every property they bought and remodeled. They stayed in the W. Calhoun Parkway property well after they lost their homestead status. Appellants testified that they stayed on so as to complete the remodeling and to maximize the profit on its resale. This was a personal economic decision by Appellants. The Commissioner did not mislead Appellants into staying in Minnesota. They were in the real estate business (as well as currency trading), and were responsible for knowing the law or making some effort to find out what the classification was. Appellants stipulated that they made no effort to keep up with these changes nor even to read the homestead documents that were sent to them. Based on these facts, we find no equitable grounds for overturning the Commissioner's decision to apply penalties and interest.

Appellants also argue that they relied on the advice of their tax return preparer in not filing in Minnesota. Appellants

informed the preparer that they were Nevada domiciliaries and therefore had not been filing in Minnesota. The preparer accepted this and prepared their federal return. There is no evidence that Appellants asked for or received a professional opinion from their tax preparer regarding their filing status. The preparer, at a later date, told Mr. Stelzner in general terms about the change in the Nondomiciliary Resident Statute and suggested they discuss the implications. Mr. Stelzner never followed up on that suggestion.

We find that Appellants did not rely on advice from their preparer. To the contrary, they did not solicit the preparer's advice on this issue even though when the statute changed to include nondomiciliary residents, the preparer advised them of the change and suggested meeting to discuss it. Appellants disregarded this advice and never made the effort to understand its implications.

With regard to the argument that Appellants relied on the IRS determination that they were domiciles of Nevada, we do not find this persuasive. The IRS merely determined that they were domiciled in Nevada. The IRS, however, did not determine whether or not they were nondomiciliary residents of Minnesota. The IRS certainly did not opine as to whether the Nondomiciliary Resident Statute applied to the Stelzners. To the extent that they relied on a domicile determination by the IRS for the proposition that they did not need to file a return in Minnesota, their reliance was misplaced and unreasonable. We find no reason to alter the determination by the Commissioner that penalties and interest are appropriate in this case.

R.R.K.

APPENDIX C

SUPREME COURT STATE OF MINNESOTA

C0-00-715
Appellate Court Case Number

7005
Trial Court Case Number

DONALD G. STELZNER, *et al.*,
Relators,

vs.

COMMISSIONER OF REVENUE,
Respondent.

JUDGMENT

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the decision of the Minnesota Tax Court filed February 25, 2000 be and the same hereby is affirmed in accordance with opinion and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.

Dated and signed: FOR THE COURT, March 21, 2001.

By: /s/ [Ilegible]
Assistant Clerk

Supreme Court, U.S.
FILED
JUL 19 2001
OFFICE OF THE CLERK

No. 00-1887

In The

Supreme Court of the United States

DONALD G. STELZNER and DONNA M. STELZNER,

Petitioners,

v.

COMMISSIONER OF REVENUE,

Respondent.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Minnesota's taxation of the net income derived from a business with interstate aspects by an individual who maintains an abode and resides for more than one-half of the tax year in Minnesota violate the Commerce Clause of the United States Constitution?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Minnesota Commissioner of Revenue respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the Supreme Court of Minnesota in this case. The opinion of the Minnesota Supreme Court is reported at 621 N.W.2d 736 (2001), and is reproduced in App. to Pet. for Cert. 1a-13a. The opinion of the Minnesota Tax Court is reported in Westlaw. *See Stelzner v. Commissioner of Revenue*, 2000 WL 37865 (Minn. T.C. Jan. 12, 2000). The tax court opinion is also reproduced in the Petition for Writ of Certiorari at App. to Pet. for Cert. 14a-28a.

STATEMENT OF THE CASE AND FACTS

Respondent adopts the procedural and factual description of this case by the courts below. See 621 N.W2d at 736-39, App. to Pet. for Cert. 1a-6a (Minn. Sup. Ct.); App. to Pet. for Cert. 15a-17a (Tax Ct.). We here briefly note only a few salient points.

From 1983 through 1999 Petitioners Donald and Donna Stelzner maintained a residence and spent the vast majority of their time in Minneapolis, Minnesota. *See* 621 N.W.2d at 737, App. to Pet. for Cert. 1a-2a. The only other residence that Petitioners occupied during the period in question was a studio condominium located in Las Vegas, Nevada. Petitioners rented this condominium and lived there for short periods of time from 1979 to May 1993. In that month Petitioners purchased the condominium unit. *See* 621 N.W.2d at 738, App. to Pet. for Cert. 16a.

Since the 1970's, Petitioner Donald Stelzner has operated a business in which he disposes of unwanted foreign and mutilated currency accumulated by gaming casinos. Most of Petitioner's clients in this foreign exchange business are casinos located in Nevada or New Jersey. *See* 621 N.W.2d at 738, App. to Pet. for Cert. 3a. During the period in question, most of Petitioners' income came from these foreign exchange operations. *Id.* Petitioners conducted the bulk of this foreign exchange business from their Minneapolis home. App. to Pet. for Cert. 22a-23a. Petitioners regularly availed themselves of the panoply of benefits associated with residence in Minnesota. App. to Pet. for Cert. 23a.

On July 20, 1995, following an audit of Petitioners' state income tax liabilities, Respondent issued an Order determining that Petitioners were liable for Minnesota income taxes for each of the seven taxable years from 1987 through 1993. Petitioners had filed no Minnesota income tax returns during this period, contending that throughout the period they were residents and domiciliaries of Nevada. The Respondent based the July 20, 1995, Order on his conclusions that for each year during the period in question: 1) Petitioners were common law Minnesota domiciliaries, and 2) irrespective of domicile, they were tax residents of Minnesota within the meaning of Minn. Stat. § 290.01, subd. 7(2).

Petitioners commenced an administrative appeal within the Minnesota Department of Revenue from the July 20, 1995 Order. On October 31, 1997, the Respondent denied the appeal and affirmed the assessment.

On January 27, 1998, Petitioners appealed that Order to the Minnesota Tax Court. On appeal, Petitioners argued, *inter alia*, that Respondent's income tax assessment violated the Commerce Clause of the Federal Constitution.

On January 12, 2000, the Tax Court issued its Findings of Fact, Conclusions of Law, and Order (App. to Pet. for Cert. 14a-28a) affirming the Commissioner's October 31, 1997, Order. The Tax Court found it unnecessary to reach Respondent's contention that the order was proper, because the Petitioners were Minnesota domiciliaries during the period in question.[1] App. to Pet. for Cert. 20a. Petitioners conceded that at all relevant times they were tax residents of Minnesota within the meaning of Minn. Stat. § 290.01, subd. 7(2), because they maintained an abode and were physically present in Minnesota for more than half of each year during the period in question. The court rejected Petitioners' Commerce Clause challenge to that statute. App. to Pet. for Cert. 20a-23a.

The Minnesota Supreme Court affirmed the Tax Court's decision. *Stelzner v. Commissioner of Revenue*, 621 N.W.2d 736 (Minn. 2001); App. to Pet. for Cert. 1a-13a. In rejecting Petitioners' Commerce Clause contention,[2] the Minnesota Supreme Court relied on its recent decision in *Luther v. Commissioner of Revenue*, 588 N.W.2d 502 (Minn.),

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[1] Acceptance of Petitioners' constitutional contentions would thus not end this case. In that event it would still be open to Respondent to urge on remand that the assessment be affirmed on this separate ground.

[2] The Court noted that the issue of Petitioners' common law domicile was not before it. *See* 621 N.W.2d at 739.

cert. denied, 528 U.S. 821 (1999), where it had rejected a Commerce Clause challenge to Minn. Stat. § 290.01, subd. 7(2) as applied to tax income received by a Florida domiciliary from a Florida-based trust. Looking to this Court's decisions in cases such as *General Motors Corporation v. Tracy*, 519 U.S. 278 (1997), the court below observed that a state tax statute does not violate the dormant Commerce Clause

> "unless there is actual or prospective competition between entities in an identifiable market and state action expressly discriminates against or places an undue burden on interstate commerce. . . . The Stelzners contend that [the Minnesota residency statute] burdens their ability to continue as major participants in a competitive interstate market . . . [but they] have not shown anything more than an incidental impact on their cost of doing business in interstate commerce. This is not sufficient evidence of either discrimination against or an undue burden on interstate commerce. . . . "

621 N.W.2d at 740-41; App. to Pet. for Cert. 10a.

REASONS FOR DENYING THE PETITION

I. Petitioners Have Not Met The Standards For Exercise Of This Court's Certiorari Jurisdiction.

This Court's Rule 10 sets forth the well-known criteria generally informing the Court's decision as to whether to grant certiorari. In the instant case, these criteria are strikingly unsatisfied.

There is no reason for the Court to grant review in this case. The decision of the Minnesota Supreme Court is not contrary to the decisions of this Court, or to those of any other state court of last resort, or to those of a United States Court of Appeals. Nor does this case present an important question of federal law that has not been, but should be, settled by this Court. Petitioners have demonstrated no need for the Court to clarify or reexamine the well-established rationale for state taxation of the income its residents earn from all sources under *Oklahoma Tax Comm'n v. Chickasaw* Nation, 515 U.S. 450 (1995), *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937), *Lawrence v. State Tax Commission*, 286 U.S. 276 (1932), and *Maguire v. Trefry*, 253 U.S. 12 (1920). *See* also *Guaranty Trust Company v. Virginia*, 305 U.S. 19 (1938).

Petitioners argue (Pet. for Cert. 7) that the instant case presents this Court with an opportunity to address what they characterize as a conflict between due process cases such as *Chickasaw Nation*, *Cohn* and *Lawrence* and authorities such as *Oklahoma State Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995) (dealing with the validity of state tax schemes under the Commerce Clause). However, Petitioners' asserted conflict among this Court's precedents is chimerical. Petitioners do not argue that Minnesota's tax scheme denies them due process. Whether, as applied here, that scheme violates the dormant Commerce Clause[3] is a question which this Court's

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[3] *See* U.S. Constitution, Art. I, § 8, cl. 3 "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, ..." The dormant aspect of this clause refers to its implicit "negative command . . . prohibiting

decisions have long answered in the negative. This case presents no occasion for the Court to depart from its long-standing interpretation of the Commerce Clause and impose the novel requirement of state apportionment of individual income urged by Petitioners.

II. The Minnesota Supreme Court's Commerce Clause Holding In This Case Was Correct And Does Not Warrant Review.

Minnesota imposes an income tax under the provisions of Minn. Stat. ch. 290 (2000). Minn. Stat. § 290.17 (2000) establishes rules under which a portion of the income of non-resident individuals and businesses may be allocated to jurisdictions other than Minnesota. However, section 290.17, subdivision 1(a) states: "the income of a resident individual is not subject to allocation outside this State." Section 290.014, subdivision 1, provides: "all net income of a resident individual is subject to tax under this chapter."

Until 1987, Minn. Stat. § 290.01, subd. 7 (1986), defined "resident" for purposes of Minn. Stat. ch. 290 as: "any individual domiciled in Minnesota and any other individual maintaining an abode therein during any portion of the taxable year who shall not, during the whole of such taxable year, have been domiciled outside the state." In 1987, the Minnesota Legislature amended the residency definition to its present form. *See* Act of May 28, 1987, ch. 268, Art. 1, § 10, 1987 Minn. Laws 1039, 1044.

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certain state taxation even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995).

Section 290.01, subdivision 7 (2000), provides in relevant part:

> The term "resident" means (1) any individual domiciled in Minnesota . . . and (2) any individual domiciled outside the State who maintains a place of abode in the State and spends in the aggregate more than one-half of the tax year in Minnesota. . . . The term "abode" means a dwelling maintained by an individual, whether or not owned by the individual and whether or not occupied by the individual, and includes a dwelling place owned or leased by the individual's spouse.[4]

With the 1987 legislation, Minnesota joined "the vast majority of states in . . . utilizing definitions of residency for income tax purposes that include another category of taxpayers in addition to domiciliaries." *Tamagni v. Tax Appeals Tribunal*, 91 N.Y.2d 530, 535, 695 N.E.2d 1125, 1128, 673 N.Y.S.2d 44, 47, *cert. denied*, 525 U.S. 931 (1998).[5]

In *Tamagni*, the New York Court of Appeals quoted the sponsors of similar legislation, originally enacted in that state in 1922, as follows: "We have several cases of

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[4] In 2001, the Legislature made certain non-substantive changes in the language of Section 290.01, subd. 7. See Act of June 30, 2001, Minn. Laws 2001, 1st Sp. Sess., ch. 5, art. 9, § 2. This amendment has no effect on the issues in this case.

[5] Indeed, it has been noted that only a handful of states limit their definition of "resident" to persons domiciled in the state. Seth Goldstein, Note, *"Resident" Taxpayers: Internal Consistency, Due Process, and State Income Taxation*, 91 Colum. L. Rev. 119, 122 n. 19 (1991).

multimillionaires who actually maintain homes in New York and spend ten months of every year in those homes . . . but they . . . [though] for all intents and purposes . . . residents of the state, have maintained a voting residence elsewhere and insist on paying taxes as nonresidents. In short, the statute is intended to discourage tax evasion by New York residents." *Id.* (citations and internal quotations omitted).

Petitioners argue that, as applied here, Minn. Stat. § 290.01, subd. 7(2) violates the so-called dormant Commerce Clause of the United States Constitution. This contention is wholly without merit. Decisions of this Court have repeatedly rejected constitutional claims like those Petitioners press.

The State's income tax assessment in the instant case has no connection to interstate commerce. "The dormant Commerce Clause prevents state taxes and regulatory measures impeding private trade in the national marketplace. . . . Thus, in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market, there can be no local preference . . . to which the dormant Commerce Clause may apply." *General Motors Corporation v. Tracy*, 519 U.S. 278, 300 (1997), (internal quotes omitted).

Petitioners identify the business they operated during the period in question as that of "servic[ing] the foreign currency exchange needs of the casino industry." Pet. for Cert. 3. What the Petitioners have wholly failed to show, however, is that Minnesota's income tax structure operates to favor or disfavor any taxpayer engaged in that businesses, vis-à-vis interstate commerce.

Petitioners are liable for Minnesota income taxes on their worldwide income "because, through [their] . . . contacts with Minnesota [they] availed [themselves] of the . . . services, benefits and protections provided to [them] by Minnesota. The requirement that [Petitioners] pay Minnesota income taxes was triggered by conduct that took place wholly within Minnesota and that did not substantially affect interstate commerce." *Luther*, 588 N.W.2d at 511, discussed with approval in the decision below, 621 N.W.2d at 741, App. to Pet. for Cert. 9a.

Central to Petitioners' argument is the broad contention that the Federal Constitution prohibits the state from levying an unapportioned tax on income of a non-domiciliary resident derived from interstate commerce. As applied to the income of a domiciliary, as Respondent contends Petitioners were, during the period in question, this contention is untenable.

It is "a well-established principle of interstate and international taxation . . . that a jurisdiction . . . may tax all the income of its residents, even income earned outside the taxing jurisdiction. . . . [T]hat the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicile itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. . . . Neither . . . is affected by . . . the source from which the income is derived." *Oklahoma State Tax Comm. v. Chickasaw Nation*, 515 U.S. 450, 462-463 (1995) (internal

quotes omitted), citing *New York ex rel. Cohn v. Graves* 300 U.S. 308, 312-313 (1937).

> The obligation of one domiciled within a state to pay taxes there arises from the unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits. *** It is enough, so far as the constitutional power of the state to levy it is concerned, that the tax is imposed by . . . [a state] on its own citizens with reference to the receipt and enjoyment of income derived from conduct of business, regardless of the place where it is carried on.

Lawrence v. State Tax Comm'n, 286 U.S. 276, 280-81 (1932).

The Court in *Lawrence* upheld Mississippi's imposition of taxes on income derived by a Mississippi resident from work done in Tennessee. Neither before nor since has this Court hinted that a state's constitutional authority to tax the income of one of its residents depends on the source or nature of the income. *See, e.g., Maguire v. Trefry*, 253 U.S. 12 (1920) (state may constitutionally subject out-of-state trust income to taxation); *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937) (state may tax out-of-state investment income).

This Court has likewise repeatedly rejected Commerce Clause challenges to such taxation. "[I]t has been established since 1918 that a net income tax on revenues derived from interstate commerce does not offend constitutional limitations upon state interference with such commerce." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458-59 (1959) (citing *William E.*

Peck and Co. v. Lowe, 247 U.S. 165 (1918), and *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321 (1918)).

Petitioners effectively concede that if they were Minnesota domiciliaries during the period in question, then the Respondent's tax assessment was constitutionally permissible. Petitioners thus urge – though pointing to no supportive authority – a constitutional difference between the taxability of domiciliaries and that of persons deemed state residents under a statute like Minn. Stat. § 290.01, subd. 7(2). There is no logical or precedential basis for such a distinction, and the courts confronting the question have uniformly declined to draw one.

In *Tamagni v. Tax Appeals Tribunal*, 91 N.Y.2d 530, 695 N.E.2d 1125, 673 N.Y.S.2d 44, *cert. denied*, 525 U.S. 931 (1998) the court sustained a New York statute similar to section 290.01, subd. 7(2) against a claim that, as applied to income derived from out-of-state intangibles, the statute created an unconstitutional risk of double taxation.[6]

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[6] Petitioners criticize the *Tamagni* decision (Pet. for Cert. at 9, 20), noting that one judge dissented from the decision of the New York Court of Appeals in that case. But that dissent was predicated on the unavailability of a credit for taxes paid by a New York resident to the jurisdiction of the resident's domicile. "New York could have avoided this burden [multiple taxation] by recognizing a credit for taxes paid to other states on income from intangible asset. . . . New York, however, has not removed the risk of multiple taxation through a tax credit. As a result, the statute that triggers this risk . . . is unconstitutional under the dormant Commerce Clause." *Tamagni*, 91 N.Y.S.2d at 549, 695 N.E.2d at 1137, 673 N.Y.S.2d at 56 (Titone, J., dissenting). In contrast, Minnesota provides such a credit. *See* Minn. Stat. § 290.06, subd. 22 (2000), discussed in the text at pp. 14-15, *infra*. The *Tamagni* dissent can thus provide no solace to Petitioners.

The same court had earlier dismissed a facial constitutional challenge to that statute. *See People ex rel. Ryan v. Lynch*, 262 N.Y. 1, 186 N.E. 28 (1933). The Minnesota Supreme Court's holdings in both the instant case and *Luther* also reject the notion that there is any constitutional distinction, for income tax purposes, between domiciliaries and non-domiciliary residents. The courts have also rejected constitutional challenges to a comparable Maryland statute. *See Reiling v. Lacy*, 93 F. Supp. 462 (D. Md. 1950) (three-judge court), *appeal dismissed sub nom. Reiling v. Tawes*, 341 U.S. 901 (1951); *Wood v. Tawes*, 181 Md. 155, 28 A.2d 850 (1942), *cert. denied* 318 U.S. 788 1943). There is no contrary authority.

Petitioners' invocation of the dormant Commerce Clause cannot produce a different result.[7] "There is no reason to suppose that the latitude afforded states under the Due Process Clause is somehow divested by the Commerce Clause merely because the taxed activity has some connection to interstate commerce, particularly when the tax is levied on an activity conducted within the state." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623 (1981) (quoted with approval in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 190-191 (1989)).

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[7] In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Court held that while North Dakota had sufficient contacts for due process purposes with an interstate mail order company to levy taxes on the company's sales within that state, the taxpayer's nexus with North Dakota was so tenuous that such a levy would violate the dormant Commerce Clause. Petitioners do not argue that their contacts with Minnesota were similarly insubstantial.

Under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), a state tax does not run afoul of the Commerce Clause if the tax is: "applied to an activity with a substantial nexus with the taxing state, fairly apportioned, does not discriminate against interstate commerce and is fairly related to the services provided by the state."

Petitioners essentially argue that, as applied to them, Minn. Stat. § 290.01, subd. 7(2) imposes a tax that is not fairly apportioned and discriminates against interstate commerce. These contentions are unpersuasive.

Complete Auto's fair apportionment test has as its "central purpose . . . to insure that each state taxes only its fair share of an interstate transaction." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995) (quoting *Goldberg v. Sweet*, 488 U.S. 252, 260-261 (1989)). Embedded in the constitutional mandate of fair apportionment are requirements that the tax be both internally and externally consistent. "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other state would add no burden to interstate commerce that intrastate commerce would not also bear. . . . External consistency, on the other hand, looks not to the logical consequences of cloning but to the economic justification for a state's claim upon the value taxed, to discover whether a state's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing state." *Id.* at 185; *accord Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 169-170 (1983).

Petitioners urge that Minnesota was constitutionally required to apportion their income. This argument misconceives the rationale for the principle of apportionment. "Apportionment is permitted only when precise geographic measurement [of income] is not feasible." *Trinova Corporation v. Michigan Dep't of Treasury*, 498 U.S. 358, 374 (1991).

Since the leading case of *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920), it has been settled that a state may employ a reasonable apportionment formula to establish a jurisdictional tax liability for a unitary, multistate enterprise. The need for apportionment has been premised on the impossibility of allocating the income of such an enterprise to any particular jurisdiction. With respect to individual income, however, these difficulties are absent. Individual income has always been constitutionally assignable to the jurisdiction where the recipient of that income resided.

Moreover, Minn. Stat. § 290.06, subd. 22 (2000), provides, through a credit, that a taxpayer may generally offset income taxes paid to other jurisdictions against Minnesota income tax liability. Thus, Minnesota's statutory scheme eliminates even the theoretical risk of multiple taxation.

There is no merit to Petitioners' assertion (Pet. for Cert. at 14-15 & n. 5) that despite the provision of a credit by Section 290.06, subd. 22, the Minnesota scheme violates the internal consistency prong of the *Complete Auto* test. Section 290.06, subd. 22 provides that if an individual domiciled in another state is subject to tax under Section 290.01, subd. 7(2), Minnesota will allow a credit

only if the jurisdiction of the taxpayer's domicile does not confer a similar credit. Were this provision replicated in every jurisdiction, and the taxpayer's domiciliary jurisdiction conferred no tax credit, the taxpayer would then receive credit in every jurisdiction in which the taxpayer was deemed a non-domiciliary resident. On the other hand, if the taxpayer's domiciliary jurisdiction allowed a credit, that credit would reduce *pro tanto* the taxpayer's income tax liability in her or his domiciliary jurisdiction. There would thus be no multiple taxation as between the jurisdiction of the taxpayer's domicile and any jurisdiction with a statute like Minn. Stat. § 290.06, subd. 22. In contending otherwise, Petitioners misread the statute.

"The external consistency test asks whether the state has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989) citing *Container Corp. v. Franchise Tax Board* 463 U.S. 159, 169-70 (1983). The record in the instant case does not demonstrate any violation of this principle. To the contrary, the Courts below found that during the period in question Petitioners maintained a home, spent a substantial majority of their time and conducted the bulk of their business in Minnesota. *See* 621 N.W.2d at 737, App. to Pet. for Cert. 1a-2a, 22a-23a. This case features no trace of the kind of overreaching at which the external consistency principle is directed.

Similarly wide of the mark is Petitioners' contention (Pet. for Cert. 2, 7, 17) not presented as such to the courts below that as applied to Petitioners, Minn. Stat. § 290.01, subd. 7(2) somehow unconstitutionally impinges on Nevada's policy decision not to levy a state income tax. This

Court has never suggested that a state's decision to adopt such a policy has constitutional implications, under the dormant Commerce Clause or elsewhere, for other jurisdictions. *Cf. Florida v. Mellon*, 273 U.S. 12 (1927). Moreover, the only plausibly relevant effect Minnesota's statutory tax residency definition might have on Nevada's no-income tax policy would be to induce some taxpayers to abandon their Minnesota residences and move to Nevada. During the period in question, the Minnesota statute clearly did not have that effect on Petitioners themselves. Petitioners' claims on this score are specious.

To support their contention that the Commerce Clause is implicated here, Petitioners point to *Wickard v. Filburne*, 317 U.S. 111 (1942) and *Camps Newfound/ Owatonna, Inc. v. Town of Harrisson*, 520 U.S. 564 (1997). *See* Pet. for Cert. 18. In *Wickard* this Court upheld application to local activity of a federal regulatory scheme enacted in furtherance of Congress's authority to regulate interstate commerce. In *Camps Newfound*, the Court struck down a state tax exemption that facially discriminated against commercial entities primarily serving out-of-state patrons. The instant case does not involve federal regulation. Nor does the Minnesota tax residency statute in any way disfavor income derived by a Minnesota resident from out-of-state sources. Accordingly, cases like *Wickard* and *Camps Newfound* are irrelevant here.

CONCLUSION

Minnesota's statutory scheme taxes the worldwide income of individuals who, like Petitioners, spend a majority of their time in Minnesota, and occupy a residence there. If such a resident pays income taxes to another jurisdiction, Minnesota allows a corresponding credit against this tax liability. Petitioners have failed to show any constitutional deficiency in this scheme.

"It was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of a state tax burden even though it increases the cost of doing the business." *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938), quoted in *Commonwealth Edison Company v. Montana*, 453 U.S. 609, 623-624 (1981). This Court should decline Petitioners' request to abandon that rule. The Petition for Certiorari should be denied.

Respectfully submitted,

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